

BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

BVIHCM NO. 2015/0097

BETWEEN:

(1) JSC MCC EUROCHEM)
(2) EUROCHEM TRADING GMBH)
Applicants/Claimants)
vs.)
)
(1) LIVINGSTON PROPERTIES EQUITIES INC)
(2) NIMATI INTERNATIONAL TRADING LIMITED)
(3) NAUTILUS SERVICES LIMITED)
(4) GLOBAL MED SERVICES INC)
(5) SEVAN PROPERTIES MANAGEMENT LIMITED)
(6) RUMBAY ASSETS CORP)
(7) BANTER INDUSTRIES LIMITED)
(8) VALERY ROGALSKIY)
(9) DIMITRY POMYTKIN)
(10) NEDJET BAYSAN)
(11) KOPIST HOLDING LIMITED)
(12) ITRADE FERTILISERS S.A.)
(13) FABIO SCALAMBRIN)
(14) DARLOW ENTERPRISES)
(15) DARLOW INVESTMENT LP)
(16) DEARBORN ENTERPRISES LIMITED)
(17) GIANTHILL MANAGEMENT LIMITED)
(18) DREYMOOR FERTILISERS OVERSEAS PTE LIMITED)
Respondents/Defendants)

TRANSCRIPT OF PROCEEDINGS

Tuesday, February 9th 2016
2:04 p.m. to 2:36 p.m.

ORAL JUDGMENT

BEFORE: HONOURABLE JUSTICE EDWARD BANNISTER, Q.C, Judge

Court Reporting Unit
Government of the British Virgin Islands
Road Town, Tortola
British Virgin Islands

APPEARANCES: MARTIN KENNEY & CO.
Chambers
Road Town, Tortola
British Virgin Islands
BY: MR. JUSTIN FENWICK QC
MR. ANDREW GILLILAND
MR. DAN WISE

For the Applicants/Claimants

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BY: MR. BEN MAYS

For the Third, Fourth and
Seventeenth Defendants

MOURANT OZANNES
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BY: MR. ANDREW EMERY

For the Second and Fifth Defendants

LENNOX PATON
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Road Town, Tortola
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BY: MR. SCOTT CRUICKSHANK
MR. MATTHEW FREEMAN

For the Eleventh Defendant

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AFTERNOON PROCEEDINGS

* * *

(Matter resumed at 2:04 p.m.)

MR. WISE: My Lord, before you give your Judgment, I wonder if I might raise two points regarding the form of order that's before you on the basis about an observation Mr. Mays made just at the beginning of the luncheon adjournment, which I think is very helpful to the parties. I draw the Court's attention to slightly unusual features of the Draft Order that's placed before you.

The first one, My Lord, is Clause 9(1)(ii) which appears at page 4 of the Draft Order. And, My Lord, you will see that that sub clause (ii) contains substantial disclosure obligations relating to the movements of money. Now, we would accept --

THE COURT: I hadn't picked that up, Mr. Wise. Right, yes.

MR. WISE: We would accept that that is a departure from the normal level of disclosure obligations imposed within a freezing order. We firstly would like to draw the Court's expressed attention to that.

THE COURT: Let me just read it.

1 MR. WISE: Yes, of course.

2 THE COURT: Which advance
3 disclosure really, isn't it?

4 MR. WISE: It is, to some
5 extent that is a summary of it, My Lord, yes. Now,
6 however, if the Order is to be granted it is on the
7 basis, some interim basis, a requirement to grant
8 interim relief pending the outcome of the trial of the
9 matter has been made out. And, My Lord, the Applicant
10 seeks to justify its inclusion by reference in
11 particular to paragraphs 42 and 43 of the Fourth
12 Affidavit of Mr. Popov which is in the freestanding
13 bundle, I believe.

14 THE COURT: Yes, it is,
15 hang on. I've got it here. 42 and 43?

16 MR. WISE: 42 and 43, My
17 Lord, the second half in particular of 42, and the
18 first half of 43. I'll let you find it, My Lord.

19 THE COURT: Yes. What does
20 this say?

21 MR. WISE: Essentially,
22 the paragraph make the point that although the
23 Applicants have gone through significant efforts in
24 obtaining the substantial amount of information, they
25 are still encountering difficulties in obtaining a full

1 picture, and the picture to which in the context of the
2 claims they make, they believe they are entitled to and
3 it's for that reason and in particular the
4 juxtaposition of the recent outcome of the disclosure
5 Order in Cyrus against what they had been told
6 previously that they think these fairly broad
7 disclosure obligation would justify within this
8 freezing order. I wanted to make that point, My Lord,
9 so it wouldn't be said that we had slip that through,
10 an unusual picture of an Order.

11 THE COURT: Thank you very
12 much.

13 MR. WISE: Now, the second
14 point, My Lord, is in respect of the, if you would look
15 at Clause 11 of the Draft Order on page 5, which is
16 dealing with exceptions to the Order, My Lord, it is
17 very common in an order such as this, My Lord, to have
18 exceptions so to the extent that a respondent to be
19 always careful in its ordinary course of business in
20 this Order, My Lord, because apart from Drey Moor, it's
21 the Applicants' case that there is no ordinary course
22 of business, there is not an exception.

23 THE COURT: Right.

24 MR. WISE: I'm getting
25 guidance from Mr. Fenwick. Oh, yes, that's the third

1 point. So that's the point about that, My Lord, there
2 isn't a normal ordinary course of business but we would
3 say with the exception of Drey Moor, the Respondents
4 tend to have an ordinary course of business.

5 And, My Lord, the final point that I seek
6 to make now is at paragraph 3, the Draft Order. It's
7 Clause 5, My Lord, of the Order, and it sets out in
8 this draft updated totals of figures, I wanted to draw
9 that to your attention, over and above which is
10 different from the original Draft Order which was
11 filed, My Lord. And that's all I have to say. Thank
12 you, My Lord.

13 THE COURT: Right. Well
14 this morning I heard an application for freezing relief
15 against a large number of Defendants by two associated
16 companies of which the First Claimant is a Russian
17 entity and the second, I believe, Swiss, which are
18 large players in the international artificial
19 fertilizer business. What has happened can be put very
20 shortly. They have discovered and there is really no
21 doubt about this, that between about 2005 and early
22 April or May 2014, two very senior executives of the
23 Russian entity had been offering favourable business
24 terms to purchasers from one or other of the two
25 companies in exchange for secret commission payments or

1 to give them their, more common term, 'bribes'.

2 The center for the fraud was, as far as
3 can be seen from what I've been shown, Moscow but there
4 were activities in Norway and possibly elsewhere which
5 contributed to the harm done to the Claimants as a
6 result of the misbehaviour of these executives. They
7 are named as the Eighth and Ninth Defendants in the
8 proceedings, but two other individuals, the Tenth
9 Defendant, who is a Turkish national, was implicated in
10 the Norwegian end of the scam and Mr. Fabio Scalambrin,
11 who was also implicated there also be made Defendants,
12 they are the Tenth and Thirteenth Defendants.

13 The inquiries made by or on behalf of the
14 two Claimant companies have established that the cash
15 which was tendered in respect of these commission
16 payments was received by essentially the First to Sixth
17 Defendants, all of which are BVI companies. Further
18 transactions involving BVI companies, after receipt,
19 appear to have been directed to laundry using or
20 concealing the money which was paid in bribes.

21 There are also Defendants who have been
22 joined as the payers of bribes, although four of the
23 most significant payers have not been joined for
24 reasons which have been explained to me and seem to be
25 good reasons.

1 There is, of course, a significant
2 problem with delay here or at least a significant
3 potential problem with delay, because although it was
4 not obviously immediately apparent in Spring of 2014
5 that the BVI Companies who received these secret
6 commissions had done so certainly by the next year,
7 2015, it had been fairly well established that they had
8 in an application which was made for similar relief in
9 that year was dismissed by me on the grounds that it
10 was effectively an application which had been badly put
11 together and didn't justify the granting of any relief.

12 Nobody knows how much, if any, of the
13 secret commissions is retained by the First to Sixth
14 Respondents, but it seems to me that notwithstanding
15 the delay, it must be right to grant freezing relief in
16 respect of them as asked.

17 It may be that all the money has gone,
18 but there is authority in England that that should not
19 militate against the grant of injunctive relief if it's
20 otherwise justified, then in my view, such relief is
21 justified here. I don't think the delay alters the
22 position. It is pleaded against those companies that,
23 and I am paraphrasing, that they were mere creatures of
24 the prime actors and as such are affected with their
25 knowledge as a result of which they hold whatever

1 assets, they retain or held whichever assets they at
2 any time did hold on constructive trust for the
3 Claimants.

4 There are claims, not only against the
5 initial recipient, as I have said, but against other
6 BVI entities which it seems to me justified similar
7 relief which I have proposed to grant.

8 Since this application is an ex parte
9 application effectively on notice, it will be open to
10 any of those entities to apply if so advised in due
11 course to have that relief discharged.

12 I have much more difficulty with the
13 claims against the four individuals, the two Moscow
14 executives, Mr. Rogalskiy and Mr. Pomytkin and
15 Mr. Baysan and his associate Mr. Scalambrin, who as I
16 have tried to explain, were involved in the Norwegian
17 end of the scam.

18 Mr. Fenwick, Queen's Counsel for the
19 Claimants says that there is every reason why freezing
20 orders should be made against them as well. He says
21 correctly that the BVI entities have been properly
22 served here, that which is true, I think there is one
23 exception, but that is a matter of time only, and he
24 says that the individuals were the Eighth, Ninth, Tenth
25 and Thirteenth Respondents unnecessary and proper

1 parties to the claims against the BVI companies have
2 been properly joined and that justice requires that if
3 the Court is going to freeze the assets of the BVI
4 entities, it should also freeze the assets of the
5 individuals.

6 I should say that permission to serve out
7 on those individuals has been granted by this Court
8 although, for understandable reasons, service has not
9 yet been able to be effected.

10 I can't accept Mr. Fenwick's submission.
11 It seems to me that whether or not they fell within
12 Rule 7.3 of our Civil Procedure Rules, the individual
13 Respondents have really nothing to do with this
14 jurisdiction at all. They are alleged to be and there
15 is strong evidence that they were the instigators and
16 perpetrators of this very serious fraud elsewhere in
17 the world. As I say, primarily in Moscow, although
18 there are other geographical areas which could be
19 pointed to, none of them so far as the evidence goes
20 has any connection with this jurisdiction other than
21 the fact that they are the proprietors of companies
22 incorporated here and none of the acts which are
23 complained of took place here.

24 Indeed, if one looks at the amended
25 pleading in relation to the BVI entities, and I am

1 starting at paragraph 35 of the Amended Statement of
2 Claim, it says:

3 "The Commissions..." and they are the
4 ones relating to the Norwegian business "...were agreed
5 and arranged between Mr. Baysan, Mr. Rogalskiy and
6 Mr. Pomytkin. The Commissions were improper secret
7 commissions which were paid and received dishonestly.
8 They involved and constituted breaches of the duties
9 owed by Mr. Rogalskiy and Mr. Pomytkin to the
10 Claimants.

11 The knowledge of Mr. Rogalskiy and
12 Mr. Pomytkin in relation to the Balderton Secret
13 Commissions falls to be attributed to..." and then
14 certain of the BVI companies recipients are mentioned.

15 And because of that knowledge, it's
16 alleged that they each received payments in
17 circumstances which means that the monies held upon
18 constructive trust for the Claimants.

19 It's true that there is a rather
20 farfetched claim in conspiracy and another for knowing
21 assistance, but basically what is being said is that
22 these are instruments in the hands of Mr. Rogalskiy and
23 Mr. Pomytkin in the perpetration of this fraud.

24 So that although it's quite true to say
25 that there is a perfectly well pleaded claim for

1 equitable relief, there is also a claim in conspiracy,
2 I might say but there is a perfectly well pleaded claim
3 for equitable relief against them. They are not
4 alleged to have done anything themselves at all in any
5 real sense, although it is said that they conspired, as
6 I have already mentioned.

7 In these circumstances, it does seem to
8 me that it's very difficult to reach the conclusion
9 that the BVI is an appropriate forum, let alone clearly
10 an appropriate forum for the trial of these
11 proceedings.

12 As I say, an order of this Court has been
13 made permitting them to be served out, of course,
14 that's an ex parte order by definition, but when it
15 comes to granting injunctive relief, it seems to me
16 that the Court has to look at the underlying realities
17 of the position. This claim is connected with this
18 jurisdiction only because it is the territory of
19 incorporation or various entities which we use to
20 receive the proceeds of the fraud, but as I have
21 already tried to indicate, it's not suggested that
22 those entities did anything at all or if they did
23 nothing very much in relation to the fraud itself.

24 I quite see the reasoning which
25 Mr. Fenwick advances, but I can't accept that it

1 justifies the Court making highly intrusive long arm
2 orders against foreigners in these circumstances.

3 For example, had proceedings been on foot
4 in another jurisdiction and this Court had been asked
5 to do so, it seems to me that it would have been right
6 for it to make Black Swan orders against the BVI
7 Respondents freezing their shares and making other
8 orders to ensure that the shares value was not
9 improperly diminished and I take the view that that's
10 really the right way around in this case and that it's
11 not appropriate to use the accident of the
12 incorporation of effectively non-actors or puppets to
13 justify injuncting the puppet masters.

14 As I've said, I will make orders against
15 the puppets as asked, although I am not going to order
16 the disclosure which is mentioned in paragraph 9,
17 subparagraph 1(ii) which seems to me to be in the
18 nature of early disclosure rather than design to enable
19 the Claimants to police the freezing injunction which I
20 do make against the BVI entities in the terms set out
21 in the second version of the Draft Order with which I
22 have been supplied. So that is my decision.

23 MR. FENWICK: I am grateful
24 for that. There are three matters to deal with
25 immediately. First, Your Lordship identified the First

1 to the Sixth Defendants.

2 THE COURT: Well, I did
3 that out of laziness but I am including all the BVI
4 entities alleged either to have received commissions or
5 to have imparted the transfers of those commissions
6 after receipt.

7 MR. FENWICK: Well, that's
8 the Seventh and Seventeenth Defendants as well.

9 THE COURT: Yes.

10 MR. FENWICK: I am grateful
11 for that.

12 My Lord, the second matter is the Order
13 at present contained an undertaking at Schedule B, "not
14 to, without permission of the Court to enforce that
15 outside the British Virgin Islands..." I have dealt
16 with that, "...or seek an order of similar nature
17 including conferring a charge or other security..."

18 So it's an order of a similar nature and
19 in respect of those Respondents where Your Lordship has
20 declined to make an order, I would invite Your Lordship
21 to make clear that they are not included in that
22 undertaking, so that we can, if so advised, proceed
23 against Mr. Rogalskiy and Mr. Pomytkin and the others
24 in some other jurisdiction.

25 THE COURT: That must

1 follow, yes.

2 MR. FENWICK: I am grateful
3 for that.

4 The second matter is this, that in
5 circumstances where Your Lordship has found, that we
6 submit correctly that there is strong prima facie case
7 that the assets received by the BVI company were held
8 on constructive trust, where if in answer to the
9 injunction the disclosure order limited that you have
10 made, it appears that the many millions of dollars are
11 no longer in the BVI companies and therefore are likely
12 to have been --

13 THE COURT: Extracted.

14 MR. FENWICK: -- extracted by
15 the individuals against whom we will be entitled to
16 trace those assets, but we should be at liberty, in
17 those circumstances, to renew the application against
18 Pomytkin and Rogalskiy, not on the basis of damages
19 claimed, but on the basis that they are likely to hold
20 traceable proceeds of the assets held on constructive
21 trust by the BVI companies, because otherwise as soon
22 as they leave BVI they become immune from prosecution
23 and normal tracing remedies would thus be denied. So,
24 I invite Your Lordship to order that we may renew the
25 application against them if it transpires that the

1 money is going to be abstracted from those companies
2 presumably by the ultimate beneficial owners.

3 THE COURT: Well, I haven't
4 granted you the full disclosure orders that you wanted,
5 but it doesn't mean to say you won't find out.

6 MR. FENWICK: If it's gone.

7 THE COURT: What?

8 MR. FENWICK: We would find
9 out if the money is gone because they have to say what
10 their assets are.

11 THE COURT: Yes.

12 MR. FENWICK: Having received
13 17 million (unclear).

14 THE COURT: I don't think
15 as fast as you, Mr. Fenwick, so you can certainly renew
16 the application.

17 MR. FENWICK: I'm grateful.

18 THE COURT: But I am not
19 suggesting for a minute that it will succeed.

20 MR. FENWICK: I understand.

21 But I would have to explain to Your Lordship, since
22 it's Your Lordship's position, the reason why I seek
23 that order.

24 THE COURT: Yes. I don't
25 think what I have done would preclude you in any event,

1 but if you want it for the avoidance of doubt --

2 MR. FENWICK: I do.

3 THE COURT: -- you've got
4 it.

5 MR. FENWICK: I am grateful.

6 My Lord, in circumstances where we have
7 today in the hope and expectation unfulfilled that Your
8 Lordship would grant protection in respect of what
9 appear to be the proceeds of monies filtered through
10 BVI companies, namely, the Russian and other
11 properties, disclose those properties so that the
12 Defendants now know what they are. I ask for
13 permission to appeal in respect of Rogalskiy and
14 Pomytkin and the assets we have identified in the
15 schedule.

16 THE COURT: You don't need
17 it, do you?

18 MR. FENWICK: Probably not.

19 THE COURT: I think
20 definitely not.

21 MR. FENWICK: I never want to
22 find out if I haven't asked for it when I should have.
23 If I don't need it --

24 THE COURT: Well, if you
25 need it, I think you should have it.

1 MR. FENWICK: I am grateful.

2 THE COURT: But I don't
3 believe that you do.

4 MR. FENWICK: Well, I'll
5 educate myself, but I didn't want to have left here
6 without having asked for it if I needed to --

7 THE COURT: No, of course
8 not, most uncomfortable feeling.

9 MR. FENWICK: Yes. And will
10 Your Lordship therefore reserve the costs because there
11 is the other matter which have to be dealt with?

12 THE COURT: What costs?
13 I've made no order for costs.

14 MR. FENWICK: No. In that
15 case -- I see there is no provision here for costs in
16 the Order, but I would normally in England be asking
17 for costs to be reserved.

18 THE COURT: To what?

19 MR. FENWICK: Your Lordship
20 is going to give a return date, I assume, given this is
21 ex parte.

22 THE COURT: I do have to.

23 MR. FENWICK: Yes. I would
24 invite you to reserve it to the return date.

25 THE COURT: I think you

1 would have to get a return date, because I haven't got
2 a diary in front of me. I mean you would have to go to
3 --

4 MR. FENWICK: I think the
5 Rules says it has to be within 28 days.

6 THE COURT: 28 days, yes.

7 MR. FENWICK: I'm hopeful it
8 would depend upon the availability of the Court,
9 somebody who could hear it. It may be for ten minutes.
10 Well, unless there is substantive application to
11 discharge.

12 THE COURT: Well, there may
13 be the applications to discharge, but I mean, I don't
14 know. I mean, I think I'll be here in 28 days, unless
15 --

16 MR. FENWICK: My Lord, we
17 will fix a date. Yes. Your Lordship has made an order
18 I think in relation to ETP one, two and three and we
19 will incorporate that somewhere in the Order.

20 THE COURT: Yes, I do think
21 that --

22 MR. FENWICK: Within 14 days
23 for affidavit. I don't know how long it will take us
24 to do it. It might take only 20 minutes.

25 THE COURT: It probably

1 will take 20 minutes. I mean, I'm just going to say
2 within a reasonable time.

3 MR. FENWICK: Okay.

4 MR. EMERY: My Lord, just a
5 short point that I raised earlier just so I have it on
6 the record here. I have been told that the application
7 that is set out (unclear).

8 THE COURT: I'm sorry,
9 Mr. Emery, I'm not hearing you.

10 MR. EMERY: Sorry. The
11 Fifth Respondent, Sevan Properties Management Limited,
12 I was informed outside that indeed Mr. Fenwick took you
13 to affidavit evidence that the freezing order was not
14 pursued against Sevan. In that light, may I just for
15 the record to ask Your Lordship --

16 THE COURT: Is that right?

17 MR. EMERY: Yes, My Lord.

18 THE COURT: Yes, okay.

19 Well the Order will have to not include that.

20 MR. EMERY: May I ask for
21 Sevan's costs of appearing today? They were served on
22 the 22nd of January, given notice --

23 THE COURT: Did you come
24 here for the second?

25 MR. EMERY: My Lord, I

1 arrived this morning for both and I was outside in the
2 hallway and I was told --

3 THE COURT: Yes. But I
4 mean you can't be split in half down the middle,
5 Mr. Emery. You've been here anyway. You haven't said
6 anything. You haven't made special points in relation
7 to Sevan.

8 MR. EMERY: My Lord, I am
9 in your hands.

10 THE COURT: Okay. Well, I
11 merely say no. Okay.

12 MR. CRUICKSHANK: My Lord, if I
13 could also raise one brief point. My understanding is
14 that, I think I am correct in saying the application
15 failed against my client, Kopist.

16 THE COURT: It did, yes.
17 Because I say it was only against recipient.

18 MR. CRUICKSHANK: In those
19 circumstances, I would then invite Your Lordship to
20 award the costs of the application in favour of Kopist.

21 THE COURT: Well,
22 Mr. Fenwick, I can't do anything else, can I really?

23 MR. FENWICK: I don't think
24 Your Lordship can in the circumstances.

25 THE COURT: Right. Well,

1 what are your costs? I don't want this to escalate.

2 MR. CRUICKSHANK: I would invite
3 Your Lordship to make an order that there be an agreed
4 figure to be assessed. We simply haven't had time to
5 put together a costs schedule.

6 THE COURT: Well, I don't
7 want to have anymore unnecessary expenditure of any
8 sort. If I said \$2,500, would you be upset?

9 MR. CRUICKSHANK: Yes.

10 THE COURT: Right. How
11 badly?

12 MR. CRUICKSHANK: Quite
13 significantly. I think, I am guessing we're going with
14 20,000 plus.

15 MR. FENWICK: My Lord, if
16 they're going to be in that Order, they really need to
17 be assessed.

18 THE COURT: Okay. I was
19 just trying to shortcut it unwise. Okay, you can have
20 your costs to be assessed. Anything else?

21 MR. FENWICK: Grateful to
22 Your Lordship.

23 THE COURT: Thank you very
24 much.

25 (Matter concluded at 2:36 p.m.)

REPORTER'S CERTIFICATE

I, LISSA NOEL, Certified Court Reporter do hereby certify:

That on the 9th day of February, 2016, the foregoing proceedings were taken down by me in machine shorthand, consisting of 23 pages herein; that the foregoing is a true and correct transcript of the proceedings had.

That I am not an attorney, relative, or employee of any party hereto, or otherwise interested in the events of this cause;

IN WITNESS WHEREOF, I have hereunto affixed my signature at Road Town, Tortola, British Virgin Islands, this 16th day of February, 2015.


LISSA NOEL
Certified Court Reporter